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## INTERPRETATIVE AUTHORITY AND THE INTERNATIONAL JUDICIARY

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### Abstract

*Without a clear delineation of their competences, the indeterminacy latent in international law opens up a powerful normative function for international courts with respect to the interpretation and development of international law. This chapter seeks to identify how international courts work within the system of international law to construct interpretative authority, and the limits within which such a claim is constructed. Making the claim that an essential role of the judicial engagement with international law is to safeguard the coherence of the international legal order, it will conclude with some reflections about the responsibility that ought to be assumed by judicial institutions when exercising normative authority within the international legal order.*

**Keywords:** authority, indeterminacy, interpretation, judicial function, normativity

### A. INTRODUCTION

International lawyers have claimed authority for international law through defining it as an objective science: a discipline through which ‘truth’ about law and legal texts can be found. Yet, as with all legal systems, international law carries with it a degree of indeterminacy that cannot just be overcome through scientific rigour or the application of presumptions. All legal orders are prescriptive, in that they seek to set abstract rules; yet the more complex the system, the more frequently one arrives at an instant where the rules are in apparent conflict, or where they appear unclear. At the point of application, when the rules are determinative of the outcome of a situation, understanding how the claim to legitimacy of the interpreter is constructed becomes crucial.

Yet the international legal system seems to avoid questions of how interpretative authority is allocated within it. It knows of no centralised judicial function that can discharge the systemic function presumed to exist in domestic legal orders; the interpretations of international courts and tribunals are in theory no different than an interpretation set down by an individual scholar. In practice, however, this is inaccurate for two reasons. First, judicial interpretation of legal texts and rules are binding on parties before that judicial institution, and thus create subjective legal obligations. Secondly, even if they are not formally law-creative, international judicial decisions possess a *centrifugal* normative force. By this, it is meant that other international legal actors tend to follow judicial reasoning faithfully: it is substantively constitutive of international law. The situation is exacerbated when dealing with *unwritten* sources of law, in particular customary international law or the nebulous general principles of law: there is no balancing between the text, its authors, and the interpreter in such situations, and the certainty of judicial reasoning holds an intrinsic appeal and is often used as evidence of unwritten law.

Judicial institutions play an outsized role in the processes of interpretation. The very vagueness of the general rules on the interpretation of positive acts in international law has created enormous discretion for judicial institutions, both international and municipal, to participate in the interpretation of acts and rules of international law. This situation was merely codified with the advent of the Vienna Convention: as Sir Hersch Lauterpacht once ventured, ‘almost the entire history of the work of the Permanent Court of International Justice could be given in terms of cases arising out of the interpretation of treaties’.<sup>1</sup> So too is it with the International Court of Justice, and indeed with the bulk of investment arbitration awards, the WTO dispute settlement panels and the Appellate Body, the *ad hoc* international criminal tribunals, ITLOS and the ICC. The interpretation of acts is thus a quintessential judicial activity, and sometimes is assumed by judicial institutions themselves to be a separate prong of the judicial function in the international legal order. Accordingly, studying the role of judicial institutions, or at least a broader enquiry as to the role of the *interpreter*, can advance the understanding of the function of interpretation and its role within a legal system. It is the interpreter who stands in the foreground when a text or rule is interpreted, even when the claim is advanced that there is a ‘correct’ interpretation which is presupposed to exist independently of the interpreter.<sup>2</sup> This is the key point to be developed here.

To situate the practice of interpretation within the judicial function is not to suggest that judicial institutions are *a fortiori* the best situated to participate in the interpretation of legal rules; instead, it is to recognise that, in practice, that the bulk of the judicial role primarily consists in interpreting the acts and rules placed before it when resolving disputes. What distinguishes the interpretation of acts by judicial institutions is that these work necessarily and formally within the confines of a defined legal system. This is important: the interpretation of international law by ‘legal organs’, authorised by the legal system itself, can have normative authority.<sup>3</sup> Again, to recall Lauterpacht, ‘the work of interpretation is one of discovering the intention of the parties not only by reference to rules of interpretation, but to rules of international law bearing upon the subject-matter of the disputed contractual stipulation. These rules may be ready at hand, or they may have to be developed by the legitimate methods of judicial activity.’<sup>4</sup> In a sense, therefore, the argument favouring the judicial role in the interpretation of rules and norms goes further than merely recognising the judicial role in interpretation. It suggests that judicial institutions are in fact guardians of the very coherence of these rules themselves: they are, as Andrea Bianchi has suggested here, very much players in the ‘game’ of interpretation.<sup>5</sup> In an indeterminate system like the international legal system, this claim has heightened relevance, as according to it, the international judiciary would gain an interpretative authority out of proportion with the

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<sup>1</sup> H Lauterpacht, *The Function of Law in the International Community* (Clarendon Press 1933), 108.

<sup>2</sup> S Jørgensen, ‘Lawyers and Hermeneutics’ (2000) 40 *Scandinavian Studies in Law* 181, 181.

<sup>3</sup> H Kelsen, *Pure Theory of Law* (M Knight trans, 2nd edn University of California Press 1970), 355: ‘[t]he interpretation of law by the science of law (jurisprudence) must be sharply distinguished as nonauthentic from the interpretation by legal organs. Jurisprudential interpretation is purely cognitive ascertainment of the meaning of legal norms. In contrast to the interpretation by legal organs, jurisprudential interpretation does not create law.’

<sup>4</sup> *Ibid.*

<sup>5</sup> See A Bianchi, ‘The Game of Interpretation in International Law: the Players, the Cards and Why the Game is Worth the Candle’, in this volume.

manner in which it discharges its function in practice, especially in relation to the development of international law.

As such, the present chapter is a starting-point for a wider project: it aims to identify whether there can be some form of wider theorising as to the judicial function in relation to interpretation. Are international judges, when interpreting and applying international law, making a claim to normative (or semantic) authority? Are they more modest ‘agents’ in the international legal process? More ominously, are they cloaking themselves in the formalism of classical legal positivism to abdicate political responsibility for the constitutive nature of their interpretation? Based both on the self-perception of international judges themselves, but also on wider theorising as to the judicial function within a legal order, my claim is that international law is ripe for a conceptual re-examination of the international judiciary’s place within the interpretative process. The silent claim judges make, through the safeguarding of systemic coherence of the legal system they inhabit, must be better understood and cognised within the international legal order.

The argument will unfold in the following stages. First, it is important to review some tenets of interpretative theory, about the cognition of the law and its application within a system by certain categories of actors. Secondly, this essay will highlight how the function of interpretation can be distinguished from that of ‘application’ in relation to the judicial function. The argument made here is that international judges do not merely enjoy persuasive authority by virtue of the quality of their reasoning. It is their particular position, *within the legal system*, that distinguishes the judicial function from other forms of interpretative activity. This piece will conclude with some brief thoughts about judicial lawmaking and the claim to authority arrogated by judicial institutions.

## **B. INTERPRETATIVE THEORY**

### **1. *A brief word on indeterminacy***

Kelsen’s ‘theory of legal science’, as a project of cognising the law through the methods of striving for truth,<sup>6</sup> did contain certain categorical assertions relating to the nature of the interpretative process. Chief amongst these is the claim that participants in legal cognition, be they scholars, judges or practitioners, ought to be limited purely to cognising positive acts of law and measuring them according to their positive validity.<sup>7</sup> Yet to do so in international law is to conflate positivism with voluntarism;<sup>8</sup> and Kelsen and other critics of classical legal positivism were sufficiently responsive to difficulties with indeterminacy in legal texts. Kelsen readily conceded the ‘intentional indefiniteness’ of certain law-applying acts and even

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<sup>6</sup> For further discussion, see J Kammerhofer, ‘Hans Kelsen in Post-Modern International Legal Scholarship’, in J d’Aspremont and J Kammerhofer (eds.), *International Legal Positivism in a Post-Modern World* (CUP, Cambridge, forthcoming 2014), ch 5, 3.

<sup>7</sup> Ibid 3.

<sup>8</sup> Ibid 7; J d’Aspremont, ‘Herbert Hart in Post-Modern International Legal Scholarship’, in J. d’Aspremont and J Kammerhofer (eds), *International Legal Positivism in a Post-Modern World* (Cambridge University Press 2014), ch 6, 22, suggests that reductionism is indifferent as to the material source of the law, concerning itself only with its *formal validity*.

the unintended indefiniteness inherent in the linguistic formulation of legal norms.<sup>9</sup> His vision of the legal system was that it formed a ‘frame’ that admitted of possible applications of norms in concrete cases<sup>10</sup> the act of individual application helped further to determine and constitute a general legal rule.<sup>11</sup> Kelsen’s critique of classical legal positivism questioned the idea that the act of interpretation was nothing but an act of understanding and clarification: he situated it as an act of will or cognition: a *choice*.<sup>12</sup> This characterisation renders untenable any categorical distinction, within a given frame, between law-creation and law-application by law-applying actors: to him, these were also law-making acts.<sup>13</sup> His solution was to admit of the constitutive nature of *discretion*, in the application of such rules, by law-applying authorities in a legal system. Similarly, Hart conceded a certain place for discretion in a legal system whose rules were sufficiently determinate to supply standards of correct judicial decision,<sup>14</sup> although he also foresaw that hard cases helped to prove a fundamental ‘incompleteness’ in law, where the law could provide *no* answer.<sup>15</sup> This is in part because Hart’s theory was essentially reductionist<sup>16</sup> in so far as it tried to confine itself to describing how law and a legal system could arrive at the validity of rules, and not on the determinacy of the legal order itself.

It is well-known that Ronald Dworkin rejected the idea that the law could be incomplete and contain gaps, choosing instead a view that law is not incomplete and indeterminate, being supplemented by *principles*, principles that can themselves be derived from moral justifications if necessary.<sup>17</sup> This would have been inadmissible to Kelsen: ‘[i]t is, from a scientific and hence objective point of view, inadmissible to proclaim as solely correct an interpretation that from a subjectively political viewpoint is more desirable than another, logically equally possible, interpretation. For in that case, a purely political value judgment is falsely presented as scientific truth.’<sup>18</sup> In any event, what is interesting about Dworkin is that the discretion exercised in the interpretative act requires the construction and balancing of the principles underlying legal rules, a ‘weak’ form of discretion exercised within the ‘open texture’<sup>19</sup> of a legal system. Legal interpretation would then become an act of cognising the

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<sup>9</sup> Kelsen, *Pure Theory of Law* (n 3) 350.

<sup>10</sup> Ibid 351.

<sup>11</sup> Ibid 349.

<sup>12</sup> Ibid 82-3.

<sup>13</sup> Ibid 85. See also I Venzke, *How Interpretation Makes International Law: Between Normative Twists and Semantic Authority* (Oxford University Press 2012), 31.

<sup>14</sup> HLA Hart, *The Concept of Law* (2<sup>nd</sup> edn Clarendon Press 1994), 145. Hart’s reliance on specifically *judicial* discretion was premised on his view that judges are law-applying officials within a given legal system; and thus specifically entrusted with safeguarding that system.

<sup>15</sup> Ibid 252.

<sup>16</sup> d’Aspremont’s term: see ‘Herbert Hart in Post-Modern International Legal Scholarship’ (n 8), 2, *passim*.

<sup>17</sup> Cf. Hart, *The Concept of Law* (n 14) 204-5, denying the legality of recourse to moral justification.

<sup>18</sup> Kelsen, *Pure Theory of Law* (n 3) 356.

<sup>19</sup> R Dworkin, *Taking Rights Seriously* (Harvard University Press 1978), 31-2. He distinguished his form of ‘weak’ discretion from the ‘strong’ discretion that he purported Kelsen and Hart attributed to judges, which

possibilities available *within* the frame of the system;<sup>20</sup> in this respect at least, it is reconcilable with Kelsen and Hart, in that it also situates the interpretative process *within* the frame of a legal system. With respect to international law, such limits are part of its inner logic, and its inherent structural biases that are deeply embedded within the international legal system itself.<sup>21</sup>

Read in this light, Hart's suggestion, that certain theorists are 'prepared to ignore any actual decisions of judges which run counter to their own logical calculations',<sup>22</sup> suggests a certain faith in judicial decisions, as being the expression of a legal text, and thus establishing the validity of a claim.<sup>23</sup>

## **2. Limits to indeterminacy**

Although the indeterminacy of legal language is in many respects presumed, it does not allow for unlimited choices in how interpretation shapes and constructs the meaning of a text. Within that indeterminacy comes a measure of determinacy; the 'canonical terms' within a legal text provide a limit to the political choices available to the interpreter. He or she cannot arrive at interpretations that clearly offend the actual words used, or that are justified by policies and principles wholly absent from the canonical terms.<sup>24</sup> Certainly the text is the 'first authoritative reference point'<sup>25</sup> through which the interpretation of a norm is constructed; but the text is not reducible to a fixed, immutable expression of the rule. What is more, the engagement of actors with a legal text is historically contingent: it is structured by the frame in which it is situated, and measured against rules contained within that frame, not to mention past practices of other actors or disputants.<sup>26</sup> As such, rule understanding is a situated

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allowed them to reach for principles *outside* a legal system. Dworkin's point is fair. If one examines Kelsen, *Pure Theory of Law* (n 3) 352, his refusal to privilege any acceptable meaning within the frame is evident: '[f]rom the point of view of positive law, one method is exactly as good as the other'. Similarly Hart, *The Concept of Law* (n 14) 204-5, admits that the interpretation of legal texts and precedents by judges leaves open a 'vast field' for judicial law-creation, yet gives few indicia as to what standards should guide judges should the legal rules in question be ambiguous.

<sup>20</sup> Kelsen, *Pure Theory of Law* (n 3) 351.

<sup>21</sup> M Koskeniemi, *From Apology to Utopia: the Structure of International Legal Argument* (reissue by Cambridge University Press 2005), 568.

<sup>22</sup> HLA Hart, *Essays in Philosophy and Jurisprudence* (Oxford University Press 1984), 268.

<sup>23</sup> Beckett suggests that the United Kingdom House of Lords' *Pinochet* judgment (*R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No 3), [2000] 1 AC 147, and the Canadian Supreme Court's *Re Secession of Quebec* (1996) 161 DLR (4<sup>th</sup>) 385, despite the obvious lack of expertise of either of those domestic courts in PIL, are regarded as 'authoritative' determinations on the customary nature of the prohibition on torture. Any teacher of international law is likely to be regarded with similar suspicion in this respect. As Beckett, 'Fragmentation, Openness, and Hegemony', p. 65 wryly notes, '[l]awyers, in short, like cases!'

<sup>24</sup> Venzke, *How Interpretation Makes International Law* (n 13) 5.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid* 49.

activity.<sup>27</sup> But radical subjectivism has its limits as well; some are rooted in the language of law itself.<sup>28</sup> Although inter-subjective meanings and the exercise of discretion are in some respects the essence of subjectivism, legal materials are neither intrinsically determinate nor indeterminate.<sup>29</sup> Owen Fiss' idea of 'dynamic interaction between reader and text' comes to mind here.<sup>30</sup>

If the process of legal interpretation and application is a form of practical reasoning, it must take place within the confines of rational legal argument: to claim that an interpretation is correct implies that the legal decision being sought or justified is rationally defensible: it is plausible in the context of the legal system.<sup>31</sup> Through a 'rational reconstruction' of legal materials, an interpreter arrives at a decision and justifies it through consistent reasoning, which must conform to the grammar of legal discourse.<sup>32</sup> It is the essence of the third-party decider's role not that they ask themselves as to the correctness or reasonableness of primary rules, but rather, whether and how such primary rules can be applied to the specific context of a case before them.<sup>33</sup> This suggests that the drive for coherence is a presumption that must be addressed. To argue the opposite demands a more difficult burden of justification: the interpreter must prove why the norms and rules under competing regimes do not constitute a rational approach to the problem at hand.<sup>34</sup> Or one could go as far as Robert Cover, who suggested that coherent legal meaning is an element in legal interpretation, not as an end in

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<sup>27</sup> O Korhonen, *International Law Situated: An Analysis of the Lawyer's Stance Towards Culture, History and Community* (Kluwer 2000).

<sup>28</sup> Ricoeur would suggest that whilst 'it is true that there is always more than one way of construing a text, it is not true that all interpretations are equal and may be assimilated to so-called rules of thumb. The text is a limited field of possible constructions'. P Ricoeur, *From Text to Action: Essays in Hermeneutics*, vol II (Northwestern University Press, 1991), 160. See also WN Eskridge and PP Frickey, 'Statutory Interpretation as Practical Reasoning' (1990) 42 *Stanford Law Review* 321, 382: '[a]lthough interpretation is neither objective nor predictable, it is bounded ... The historical text itself constrains, for the interpreter is charged with learning from the text and working from it to the current problem. Moreover, the interpreter's perspective is charged with learning from the text and working from it to the current problem. Moreover, the interpreter's perspective itself is conditioned by tradition—the evolution of the historical text as it has been interpreted, the values of society, and current circumstances. While these constraints certainly do not dictate a result, the interpreter cannot disregard the force of that which envelops and situates her in present society.'

<sup>29</sup> See D Kennedy, 'A Left Phenomenological Critique of the Hart/Kelsen Theory of Legal Interpretation' in E. Cáceres et al (eds), *Problemas Contemporáneos de la Filosofía de Derecho* (UNAM 2005) 371, 380-1.

<sup>30</sup> O Fiss, 'Objectivity and Interpretation' (1982) 34 *Stanford Law Review* 739.

<sup>31</sup> D Pulkowski, *The Law and Politics of International Regime Conflict* (Oxford University Press 2014), 252.

<sup>32</sup> N MacCormick, 'Risking Constitutional Collision in Europe?' (1998) 18 *Oxford Journal of Legal Studies* 556. See also JM Balkin, 'Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence' (1993) 103 *Yale Law Journal* 105: '[t]he experience of legal coherence is the result of our attempt to understand law through the process of rational reconstruction. ... To rationally reconstruct the law is to attempt to understand the substantive rationality emanating from it.'

<sup>33</sup> J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1998), 267.

<sup>34</sup> Pulkowski, *International Regime Conflict* (n 31) 255.

itself, but because the privileging of a certain interpretation displaces other possible alternatives, and always with a view to the coherence of the overall legal system.<sup>35</sup>

Therefore, the outer limits that mark the field of possible interpretations may be recognised in an act of scientific legal cognition by capable legal scholars;<sup>36</sup> but true to the Kantian inspiration of Kelsen's legal theory, the concrete meaning of a norm in the individually disputed case cannot be *discovered* but only *created*. This is broadly consonant with Hart's social thesis, where the claim to authority of an interpretative act is determined by adherence to the standards of legal argument and interpretation that are *accepted* by officials within that system.<sup>37</sup> Understood thus, interpretation is a relatively open exercise taking place within a confined setting, a setting defined by the four corners of the text itself.<sup>38</sup> Even in classical legal positivism there is a certain openness based in the *language* used in constructing a text: '[b]y virtue of linguistic openness, legal positivism in its purest form is never immune to such changes in meaning and to the consequent informal development of law'.<sup>39</sup> As such, the theoretical possibilities of reasonable meaning—and thus, the contestability of meaning—are constrained by these practical limits, which would confirm the binding force of international law.<sup>40</sup>

The space opened by indeterminacy opens up a powerful normative function for judiciaries. Hart was adamant that 'once the myths which obscure the nature of the judicial processes are dispelled by realistic study, it is patent ... that the open texture of law leaves a vast field for a creative activity which some call legislative.'<sup>41</sup> Judges, as agents of the system, work within that system: they are guided to safeguard the purpose of the rules that they are interpreting; they do not have to make blind and arbitrary judgments, or reduce themselves to 'mechanical' deduction.

Agency within the system distinguishes the judicial function from that of legal scholars, or activists. To Dworkin, 'the interpretive attitude cannot survive unless members of the same interpretive community share at least roughly the same assumptions' about 'what counts as part of the practice'.<sup>42</sup> Dworkin's theories have been taken to be less a theory of *law* than a theory of *adjudication*: but it is in that theory of adjudication that Dworkin situates interpretation—the most powerful weapon in a judge's arsenal—to participate in the development of that legal system. The opposite position is that proposed by Ian Johnstone: 'Interpretive authority ... resides in neither the text nor the reader individually, but with the

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<sup>35</sup> R Cover, 'Nomos and Narrative' (1983) 97 Harvard Law Review 4, 47.

<sup>36</sup> H Kelsen, *General Theory of Norms* (Clarendon Press 1991), 44.

<sup>37</sup> R Dworkin, *Law's Empire* (Hart 1986), 67.

<sup>38</sup> Dworkin, *Taking Rights Seriously* (n 19) 108-109.

<sup>39</sup> U Fastenrath, 'Relative Normativity in International Law' (2003) 14 *European Journal of International Law* 315, 316.

<sup>40</sup> Venzke, *How Interpretation Makes International Law* (n 13) 49.

<sup>41</sup> Hart, *The Concept of Law* (n 14) 204.

<sup>42</sup> Dworkin, *Law's Empire* (n 37). 67.



community of professionals engaged in the enterprise of treaty interpretation and implementation.<sup>43</sup> Owen Fiss, within the American domestic context, situates the relevant interpretive community as the judiciary, ‘by virtue of their office’, which carries with it a ‘commitment to uphold and advance the rule of law itself’.<sup>44</sup> The claim of authority is therefore extrinsic to the process of interpretation,<sup>45</sup> and in fact somewhat grounded on any meta-law on sources; in short, the claim is not one of intellectual cogency, but *formal* legitimacy: the judicial office automatically confers authority on the interpretation issued therefrom. The same reasoning cannot obtain at the international level, for the international judiciary, formally at least, does not occupy a similar hierarchical position.<sup>46</sup>

### 3. Authenticity in interpretation and the authority of the interpreter

#### a. Concept of ‘authentic interpretation’

The concept of ‘authentic interpretation’,<sup>47</sup> as representing an interpretation on which all parties were agreed, was first mentioned in the case law of the PCIJ. Judge Hudson drew a distinction between interpretation and application, and the function of interpretation more generally: he saw it as imperative that ‘the definitely entertained and expressed intentions of the parties should be effectuated’,<sup>48</sup> thus privileging the natural meaning of terms over consideration of purpose. He also distilled a few practices from the case law of the PCIJ that came to be embodied in Articles 32-33 VCLT; notably, its reliance on preparatory works to confirm interpretations over which it had no doubt.<sup>49</sup>

#### b. Identity of the interpreter in theory of international law

What became Articles 31-33 of the Vienna Convention prescribed the methods of treaty interpretation but not *who* was to interpret them; a point not lost even within the International Law Commission.<sup>50</sup> This is an old question: in *Jaworzina*, the Permanent Court indicated that

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<sup>43</sup> I Johnstone, ‘Treaty Interpretation: the Authority of Interpretive Communities’ (1990-1991) 12 *Michigan Journal of International Law* 371, 372.

<sup>44</sup> O Fiss, ‘Objectivity and Interpretation’ (1982) 34 *Stanford Law Review* 739, 754; criticised as a ‘theory of judicial interpretation’ by S Fish, ‘Fiss v. Fish’, (1984) 36 *Stanford Law Review* 1325.

<sup>45</sup> Johnstone, ‘Treaty Interpretation’ (n 43) 375.

<sup>46</sup> See J Stone, ‘Fictional Elements in Treaty Interpretation: A Study in the International Judicial Process’ (1954) 1 *Sydney Law Review* 344, 364; R Falk, ‘On Treaty Interpretation and the New Haven Approach: Achievements and Prospects’ (1967-1968) 8 *Virginia Journal of International Law* 323, 326; and on the ‘communicative’ judicial function, see Johnstone, ‘Treaty Interpretation’ (n 43) 375-76.

<sup>47</sup> MO Hudson, *The Permanent Court of International Justice 1920-1942* (Macmillan, New York, 1943), 640-1; see also O Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (Cambridge University Press 2005), 236-7.

<sup>48</sup> *Ibid* 643-4.

<sup>49</sup> *Ibid* 653-4. Cf *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) [2011] ICJ Rep 70, where the Court used the *travaux préparatoires* of CERD to confirm the interpretation that it had already given: para 142.

<sup>50</sup> See intervention by Mr Tsuruoka, [1964] *Yearbook of the International Law Commission*, vol I, 280, para 72.

‘... it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has the power to modify or suppress it’.<sup>51</sup> It is inherent in the process of interpretation itself, as treaties between States almost invariably provide that questions of interpretation and application of a treaty are to be resolved by a third party.<sup>52</sup>

The real question is not who most often interprets and applies treaties, which invariably concerns the parties to the treaty most; the conceptually interesting question arises when there are diverging views on the interpretation of an obligation, and whether there is a *hierarchy of authority*. In other words, whose interpretation can be regarded as authoritative? The judicial (or at the very least, the ‘impartial third party’) role there comes to be acutely important, as it conditions both the practice of States in contracting obligations.<sup>53</sup>

c. ‘Authoritative interpretation’ formalised

Authoritative interpretation in the classic sense is a relevant consensual undertaking, where consent is given by the parties, and the interpreter operating on the basis of delegated authority.<sup>54</sup> But what of situations where that authority is not delegated clearly, for example, with rules of customary international law, or general principles of law? Can one genuinely say that there is authoritative interpretation writ large, or for general international law?

The openness of the interpretative process leads directly to a consideration of the *limits* of legal order in international society; in short, if the interpretative act is properly understood, there is no way for an international tribunal to render an authoritative judgment.<sup>55</sup> Yet

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<sup>51</sup> *Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina)*, PCIJ Advisory Opinion, Series B, No 8, at 37. Ruda raised this in the ILC as well: see 765<sup>th</sup> meeting (14 July 1964), in [1964] *Yearbook of the International Law Commission*, vol I, 277, para 34: ‘[i]nterpretation occurred at two different levels. First, as between States, the only legally valid interpretation of a treaty was the authentic interpretation by the parties to the treaty. The other level was that of interpretation by arbitration, for which there were fundamental principles ...’

<sup>52</sup> Although R Gardiner, *Treaty Interpretation* (Oxford University Press 2007), 109 makes the point, he does not link it conceptually.

<sup>53</sup> See eg *The Restatement of the Law (Third), The Foreign Relations Law of the United States* (American Law Institute 1987), 3: ‘...this Restatement represents the opinion of The American Law Institute *as to the rules that an impartial tribunal would apply* if charged with deciding a controversy in accordance with international law’. [Emphasis added.]

<sup>54</sup> G Schwarzenberger, ‘Myths and Realities of Treaties of Treaty Interpretation: Articles 27–29 of the Vienna Draft Convention on the Law of Treaties’ (1968) 9 *Virginia Journal of International Law* 1, 11; A McNair, *The Law of Treaties* (2<sup>nd</sup> edn Clarendon Press 1961), 531–532. This has to be distinguished from Kelsen’s idea of ‘authentic’ interpretation (as distinguished from ‘scientific’ interpretation): as J Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (Routledge 2011), 115 describes Kelsen’s concept, authentic interpretation is performed by organs authorised by the law to apply it; the *result* of authentic interpretation is a norm, or a law-creating act; authentic interpretation is an act of *will*, whereas scholarly interpretation is an act of *cognition*; ‘one determining what is law, the other finding the law’. He then makes the claim (with which the present author disagrees) that ‘[b]ecause an act of will is necessary for the creation of positive law, authentic interpretation as law-creation must be an act of will; mere cognition cannot create norms’. On short, one needs an act of *volition*, not merely an act of cognition; and the question is *whose* act of volition is creative of law.

<sup>55</sup> Falk, ‘On Treaty Interpretation’ (n 46) 336.

whatever the (lack of) formal authority, the reality is that some interpretations are simply more authoritative than others: they carry with them the idea of *normativity*. In so doing, the claim to authority gives a target audience the comfort of precedent, of black robes, of objectivity; legal scholars shy away from engaging in meaningful and original criticism when we can hide behind these alluring sources. In this respect, despite the fact that the third-party interpreter settling a dispute (an ‘authorised organ’) *decides*, thus on some level applying the law (unlike the scholar, who merely ‘cognises’<sup>56</sup>), one must reject the Kelsenite conceit that this renders nugatory any normative effect any ‘non-authorised’ interpretation may have.<sup>57</sup> Serge Sur attempted to distinguish between ‘doctrinal’ and ‘juridical’ interpretation on the same basis; the former had as its wider aim the understanding of the international legal order, the latter, by ‘qualified legal agents’, was only interested in its functioning.<sup>58</sup> But the distinction was not hermetic: ‘juridical’ interpretation was a combination of ‘cognition’ and ‘will’, fusing the doctrinal with the functional to favour one particular solution.<sup>59</sup>

### C. THE FALLACY IN THE INTERPRETATION AND APPLICATION DISTINCTION

The distinction between ‘application’ and ‘interpretation’ was first articulated in the Harvard draft convention on the law of treaties, which provided that:

Interpretation is closely connected with the carrying out of treaties, for before a treaty can be applied in a given set of circumstances it must be determined whether or not it was meant to apply to those circumstances ... In any particular case there may be no expressed doubt or difference of opinion as to the meaning of the treaty concerned; its purpose and applicability may be regarded as perfectly evident. Yet, even in such a case, the person or persons deciding that the meaning of the treaty is ‘clear’, and that it is plainly intended to apply to the given circumstances, must do so, consciously or unconsciously, by some process of reasoning based upon evidence.

In short, the ‘application’ of treaties, it would seem, must almost inevitably involve some measure of ‘interpretation’. There is, however, a recognized distinction between the two processes. Interpretation is the

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<sup>56</sup> Kammerhofer, *Uncertainty in International Law* (n 54) 106.

<sup>57</sup> Ibid citing H Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (London Institute of World Affairs 1950), xvi: ‘Non-authentic interpretation of the law, that is interpretation by persons not authorised by the law itself, is legally as irrelevant as the judgment of a private person on the guilt or innocence of an individual accused before a competent court of having committed a crime.’ This is emphatically not the case in international law: to give equally simple (and even trite!) examples of when ‘non-authorised interpretation’ created serious doctrinal controversy and threatened to change the law: when Chile extended its exclusive economic zone to 200 nautical miles; when the ICTY threw down its ‘overall control’ test in *Prosecutor v Tadić* (Judgement), Case No IT-94-1-A, (1999) 38 ILM 1518; when the House of Lords in *Regina v Bow Street Metropolitan Stipendiary Magistrate And Others, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147, [1999] 2 All ER 97, constructed a doctrine of implied waiver to extradite General Pinochet to Spain on charges of torture; and when the Italian Court of Cassation in *Ferrini v Federal Republic of Germany*, Decision No 5044/2004, 128 ILR 658 disregarded the jurisdictional immunity of Germany. All of these cases led to serious wrangling and a realignment by States of how they perceived customary international law. In short, whatever the correctness of any of these acts, and even if they failed to change the law in substance, their potential for normativity (actualised in some cases!) is manifest. Kelsen was wrong.

<sup>58</sup> S Sur, *L’interprétation en droit international public* (LGDJ 1974), 98.

<sup>59</sup> Ibid 98-99.

process of determining the meaning of a text; application is the process of determining the consequences which, according to the text, should follow in a given situation.<sup>60</sup>

It is arguable that interpretation and application can be easily distinguished through their outcomes: as Schwarzenberger asserted in 1968, '[i]nterpretation is the process of establishing the legal character and effects of a consensus achieved by the parties. In contrast, application is the process of determining the consequences of such an interpretation in a concrete case.'<sup>61</sup> To Schwarzenberger's mind, interpretation is thus 'independent of, and need not be followed by, the application of the treaty',<sup>62</sup> therefore clearly delineating a doctrinal function for interpretation distinct from the judicial function of application. Although he did acknowledge that any application of a treaty, 'including its execution, presupposes, however, a preceding conscious or subconscious interpretation of the treaty'.<sup>63</sup> This view would, argues Ulf Linderfalk, reduce international courts and arbitration tribunals to police, civil servants and military officials: they are all (in his terms) 'appliers' of international law.<sup>64</sup>

The judicial role in all of this becomes clear: under the orthodox positivist view, judicial interpretation and application are to be nothing more than to fulfil the Montesquieuesque role to 'speak the law' (*jus dicere, dire la loi*). Whatever language was used, 'interpretation was always present as a supplement to the judicial truth-saying role. Power over truth.'<sup>65</sup> And yet, reality has always been quite different:

'Application' of the law ... was the repository of power, in service of interpretation as interpretation served the law. These relations do divide truth from power and can be seen to deny power. But it is more accurate to think of the discourse as managing a shifting place for power within the liberal order. 'Interpretation' in traditional liberal legal discourse endangered the serenity of truth-disguised power as it reinforced that hegemony by both domesticating and diverting acknowledgment of judicial action.<sup>66</sup>

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<sup>60</sup> 29 (1935) AJIL Supplement 938 (see also Gardiner (n 52) ch 2, s 4, for comments on the Harvard Convention generally).

<sup>61</sup> G Schwarzenberger, 'Myths and Realities of Treaties of Treaty Interpretation: Articles 27-29 of the Vienna Draft Convention on the Law of Treaties', (1968) 9 *Virginia Journal of International Law* 1, 7, citing the Dissenting Opinion of Judge Ehrlich in *Case concerning the Factory at Chorzów* (Claim for Indemnity: Jurisdiction), [1927] PCIJ Series A, No 9, at 39.

<sup>62</sup> Ibid 8, citing *Case concerning certain German Interests in Polish Upper Silesia* (Merits), [1926] PCIJ Series A, No 7, pp. 18-19.

<sup>63</sup> Ibid 8, citing *Mavrommatis Jerusalem Concessions*, [1925] PCIJ Series A, No. 5, 47-48. This was also the language used by the Harvard Draft on the Law of Treaties, p. 938; and cited approvingly on this point by J d'Aspremont, *Formalism and the Sources of International Law: A Theory on the Ascertainment of Legal Rules* (OUP, Oxford, 2011), p. 157. But cf. Dissenting Opinion of Judge Anzilotti in *Interpretation of the 1919 Convention concerning Employment of Women During the Night* (Advisory Opinion of 15 November 1932), PCIJ Ser. A/B, No. 50 (1932), 383: '[i] Article 3, according to the natural meaning of its terms, were really perfectly clear, it would be hardly admissible to endeavour to find an interpretation other than that which flows from the natural meaning of its terms. But I do not see how it is possible to say that an article of a convention is clear until the subject and the aim of the convention have been ascertained, for the article only assumes its true import in this convention and in relation thereto.'

<sup>64</sup> U Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007), 1.

<sup>65</sup> D Kennedy, 'The Turn to Interpretation' 58 *Southern California Law Review* (1985) 251, 253.

<sup>66</sup> Ibid.

To fixate on interpretation merely as a ‘clarifying operation’,<sup>67</sup> one aiming merely at understanding or lending meaning to a text, is a distinctive feature of the orthodox positive view, which presumes there to exist some ‘correct’ or ‘proper’ interpretative process. That view does not, for example, take account of the active role of the interpreter within the interpretative act, and reinforces the sense that interpretation as a process serves only to uncover what is objectively true. As Lauterpacht suggests, ‘... there is nothing easier than to purport to give the appearance of legal respectability and plausibility—by the simple operation of selecting one or more rules of interpretation—to a judicial decision which is lacking in soundness, in impartiality, or in intellectual vigour.’<sup>68</sup> Accordingly, even the *process* of identifying legal norms requires a choice as to which theory of sources one privileges, which demonstrates how the claim to objectivity in law-identification can be problematic.<sup>69</sup>

In this respect, it almost does not matter whether one favours an approach to judicial interpretation that serves to constrain or to empower a judge, for example, invoking overarching principles such as restrictive interpretation or of ‘effectiveness’. The real issue is that any such overarching principle temporarily privileges an imaginary displacement of judicial power, be it in favour or against judicial discretion. But each is defined by connection of the judge to the truth, be truth a matter either of text or merely of the effects generated by a judicial decision.<sup>70</sup> The rules of interpretation are ‘not the determining cause of judicial decisions, but the *form* in which the judge cloaks a result arrived at by other means’.<sup>71</sup>

Look, then at the normative move proposed in Lauterpacht’s deliberate tie between interpretation and adjudication. Lauterpacht’s concept of law upheld the centrality of the judicial function within any legal system, in terms that would suggest that the judicial function served to ensure that the values and priorities embodied within the legal system would be generally respected. It was not to act mechanically:

‘[t]he judicial function is not that of an automaton which registers a gap, an obscurity, an absurdity, a frustrated purpose, without an attempt to fill the lacunae by reference to the intentions of the parties in the wider context of the agreement as a whole and the circumstances accompanying its adoption, to the needs of the community, and to the requirement of good faith. ...

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<sup>67</sup> McNair, *The Law of Treaties* (n 54) 365, fn 1: ‘[t]he words “interpret”, “interpretation” are often used loosely as if they included “apply, application”. Strictly speaking, when the meaning of the treaty is clear, it is “applied”, not “interpreted”. *Interpretation is a secondary process which only comes into play when it is impossible to make sense of the plain terms of the treaty, or when they are susceptible of different meanings.* The *Concise Oxford Dictionary* says: ‘Interpret: expound the meaning of (abstruse words, writings, &c.); make out the meaning of.’ [Emphasis added.] But cf Gardiner, *Treaty Interpretation* (n 52) 27: ‘... it is difficult to see how this sustains the distinction ... between the circumstances for interpretation and for application, and the relation [McNair] attributes to them. ... This sets on its head the natural sequence that is inherent in the process of reading a treaty: first ascribing meaning to its terms and then applying the outcome to a particular situation.’

<sup>68</sup> Lauterpacht, *Function of Law* (n 1) 53.

<sup>69</sup> J Beckett, ‘Countering Uncertainty and Ending Up/Down Arguments: *Prolegomena* to a Response to NAIL’, (2005) 16 *European Journal of International Law* 16 213.

<sup>70</sup> Kennedy, ‘The Turn to Interpretation’ (n 65) 253.

<sup>71</sup> H.Lauterpacht, ‘Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties’ (1949) 26 *British Year Book of International Law*, 53.

But ... that quasi-legislative function ought not to be so deliberate or so drastic as to give justifiable ground for the reproach that the tribunal has substituted its own intention for that of the parties.'

Defining the judicial function as 'quasi-legislative', even in the absence of an international legislative body or process, goes beyond merely to affirm the centrality of the judicial function within the legal system. It is a statement that affirms, in terms redolent of Ronald Dworkin, that the judicial function exists not only as a guardian of the coherence of the legal system, but equally as the guardian of the wider interests of the political community, even when these have not necessarily been embodied into law. They become, to use Dworkin's terms, a 'deputy legislature' rather than a 'deputy to the legislature',<sup>72</sup> in the sense that law-creation, using the methods and techniques of interpretation, becomes regarded as legitimate judicial activity.

Yet, even in the distinction between operative interpretation (those who apply) the law and 'doctrinal' interpretation (those who consider and study the law),<sup>73</sup> the role of the interpreter is often over-simplified. Scholars concerned with interpretation, by examining merely what a judge *has decided* when he or she says the law, but without questioning the process of judicial decision and the methods used to settle a dispute, are engaging in apologetic scholarship. What is meant by apologetic scholarship is that they are in essence domesticating judicial activity and distracting attention from judicial power; this destabilises the patterns of traditional judicial discourse, as it privileges description rather than critical scrutiny. Julius Stone was correct in decrying the canonist rhetoric as fundamentally apologist, obscuring the judicial function in interpretation through a veneer of objectivity: 'the appearance of an objective decision based on compulsive legal directives, where in reality no legal compulsion does exist.'<sup>74</sup> In so doing, judicial interpretation can be imagined as simultaneously more and less constrained than judicial application; the process of interpretation was both prior to and in service of substance.<sup>75</sup> The purpose of this subterfuge: 'to disarm the still prevalent prejudice against judicial law-making',<sup>76</sup> whatever the ambiguity intentionally or accidentally provided by the parties.<sup>77</sup>

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<sup>72</sup> Dworkin, *Taking Rights Seriously* (n 19), 83.

<sup>73</sup> Linderfalk, *Interpretation* (n 64)12.

<sup>74</sup> J Stone, 'Fictional Elements in Treaty Interpretation: A Study in the International Judicial Process' (1954) 1 *Sydney Law Review* 334, 364. At 347, he went further: '[i]t is notorious that ... treaty terms may often be intended, not to express the consensus reached, but rather to conceal the failure to reach one. In multilateral instruments, especially political ones, that agreed content expressed by the terms may be far less important than the non-agreed terms concealed by them. When a case arises involving the non-agreed content of the treaty, interpretation of the terms, even if purporting to find the intention of the parties is not in fact doing so. "The imputation of intention in such a case is a fiction concealing the true nature of the activity".'

<sup>75</sup> Kennedy, 'The Turn to Interpretation' (n 65) 253.

<sup>76</sup> Stone, 'Fictional Elements' (n 74) 349. At 358, Stone suggests that the exercise of institutional rule-creation is obscured behind assumed intention, with the consequence of 'exercising power without the acceptance of responsibility for it'.

<sup>77</sup> The critique proffered by MS McDougal, HD Lasswell, and JC Miller, *The Interpretation of Agreements and World Public Order: Principles of Content and Procedure* (Yale University Press 1967), 264-5, is interesting: '[i]t is highly unlikely that international tribunals will be adequately protected against 'premature strains' by 'fictions'; neither the participants in processes of decision nor scholarly observers are likely to be tranquilized by attempts to "conceal judicial creativeness" by such evasions, even if skillful.'

Indeed, as Beckett cautions, '[w]ho describes and who decides are interrelated, cumulative, problems. The question of expertise gives way to one of epistemic authority, the need to decide, and thus to appropriation by the authoritative discourse'.<sup>78</sup> And as Koskeniemi explains, knowledge of the forum in which a dispute will be decided is tantamount to knowledge of the decision which will be made.<sup>79</sup>

There is a better view: judgments and actions are '*commitments* that are subject to a kind of normative assessment, as correct or incorrect'.<sup>80</sup> They are a commitment to legal rationality and to the view that the legal aspects of issues can be resolved in isolation, if only the application of the 'correct' rules can be made. Judicial interpretation does not carry with it the same weight as that of the military commander, for example; as an exercise, it is a fusion of both operational and doctrinal interpretation, given the claim to heightened authority of judicial interpretations, not to mention its application to a concrete set of facts, and finally enhanced by the normative weight to be given. The so-called 'validity of the interpretation result' is therefore not limited to the factual situation at hand, but carries normative repercussions for the legal order as a whole—whether that judicial interpretation is purely international or on the domestic plane. 'Precision' in this sense merely confuses the result—the reality is that however precise a judicial institution will aim to be, scholars and practitioners will naturally gravitate towards judicial decisions to lend them guidance, especially in a legal order where room is allowed for indeterminacy and a degree of incoherence.

The claim of judicial institutions to a heightened role in the interpretation of legal rules, or even to 'authoritative interpretation', remains highly contentious, not least because of the systematic constraints that permeate the work of international courts. Judicial institutions remain accountable to States externally, through their limited jurisdiction (whether optional jurisdiction, or jurisdiction limited *ratione personae* or *ratione materiae*), and internally, through the processes of nomination and selection of judges to the international bench.<sup>81</sup> If one accepts the nature of international law as a law of coexistence at least in part, and one also accepts Kolb's premise that the interpretative act is also capable of developing the international law on the matter, then the role of judicial institutions must be conceptually limited, as States must continue to hold at least a default or first-order role in the interpretation of the obligations which they themselves have entered.<sup>82</sup> Even if one makes the

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<sup>78</sup> J Beckett, 'Fragmentation, Openness, and Hegemony: Adjudication and the WTO' in MK Lewis, S Frankel (eds), *International Economic Law and National Autonomy* (Cambridge University Press 2010) 44, 56.

<sup>79</sup> M Koskeniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Review* 1, 8.

<sup>80</sup> R Brandom, 'Some Pragmatist Themes in Hegel's Idealism: Negotiation and Administration in Hegel's Account of the Structure and Content of Conceptual Norms' (1999) 7 *European Journal of Philosophy* 164, 165-6.

<sup>81</sup> These constraints are aptly summed up in a previous work by the present author: see GI Hernández, 'Impartiality, Bias, and the International Court of Justice', (2012) 1(3) *Cambridge Journal of International and Comparative Law* 183.

<sup>82</sup> This is an issue coming to the fore in the realm of international investment law, where the decentralised (and voluminous) resolution of disputes by arbitral awards has led to wider debates as to the role of investment tribunals and their awards as a source of law: see eg A Roberts, 'Power and Persuasion in Investment Treaty Arbitration: The Dual Role of States' (2010) 104 *American Journal of International Law* 179, esp. 188 *et seq.*

argument that States could have delegated their first-order role in the interpretation of obligations to judicial institutions when they consented to their jurisdiction, the constraints on these adjudicatory bodies has resulted in such judicial institutions hewing, broadly speaking, to the views of States.

Finally, it is important, within the context of the claim to interpretative authority advanced by international courts, to remain cognisant of the targeted audience. The effective authority commanded by a court is reliant on the ability to persuade the wider audience of international society; as Bianchi has explained, the court can only be regarded as persuasive if it calibrates its argument precisely to appeal to its target audience.<sup>83</sup> In international law, that audience is not merely the parties before the judicial institution, but equally, future and potential parties, other international courts, and to an extent, the views of other members of the ‘epistemic community’ of international lawyers.<sup>84</sup>

In this respect, the idea of a ‘syntax’ common to international lawyers suggested by Pierre-Marie Dupuy, ‘*qui autorise la creation et la validité des normes*’<sup>85</sup> which would emanate from functionally different specialised regimes in international law, could be very useful. This idea of syntax, of a common grammatical code, would serve to distinguish international law from other legal orders (or, for that matter, from other normative orders). And this idea of commonality also has a darker side: to privilege systemic unity and coherence over other priorities, and deigns to presume, or if necessary, construct the existence of norms that resolve normative conflicts, impose a hierarchy of norms, and if necessary, even harkens back to the ultimate rule or *Grundnorm* that will legitimate the entire legal order. It is, in some respects, the conceit of the epistemic community of international lawyers that our international legal system can and necessarily must take this form:

A professionally competent argument is rooted in a *social concept of law*—it claims to emerge from the way international society is, and not from some wishful construction of it. On the other hand, any such doctrine or position must also show that it is not just a reflection of power—that it does not only tell what States do or will but what they *should* do or will.<sup>86</sup>

The final focus of this piece is on how the methods and forms of interpretation constitute a claim to wider normative authority by judicial institutions. The wider question of the identity and function of the interpreter does seem generally to be an area of enquiry which most major recent books on interpretation (Orakhelashvili, Kolb and Gardiner, with perhaps Linderfalk’s linguistic analysis, and excluding of course Venzke) seem to have ignored. Accordingly, the role *judicial* interpreters themselves play in interpretation in lawmaking will be briefly discussed.

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<sup>83</sup> Bianchi (n 5) 4.

<sup>84</sup> The concept of ‘epistemic communities’ is understood here in the same sense as in A Bianchi, ‘Gazing at the Crystal Ball (again): State Immunity and *Jus Cogens* beyond *Germany v Italy*’ (2013) 4 *Journal of International Dispute Settlement* 1.

<sup>85</sup> P-M Dupuy, ‘L’unité de l’ordre juridique international’ (2002) 297 *Recueil des Cours* 1. A similar idea of ‘*discourse rules of international law*—a grammar for communicative interaction’ was put forward in Pulkowski, *International Regime Conflict* (n 31) 238.

<sup>86</sup> M Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP reissue, Cambridge 2006), Epilogue, 573-4.



#### D. CONCLUSION: JUDICIAL INTERPRETATION AND THE CLAIM TO NORMATIVE AUTHORITY

There is resistance to the idea that judicial institutions possess authority for the development of international law. Such a claim is seen as problematic precisely because the foundation for courts' authority within a legal system usually subordinates them to the law-creating actor: again, to use Hart's paradigm, they are *deputy to the legislature* rather than *deputy legislator* (although Hart does foresee that when the rules run out, the latter is permissible). Judges shield their decisions through an outward show of judicial technique, behind which judges shield themselves from the accusation that they are engaging in law-creation rather than merely the interpretation of the law.

It behoves legal scholars to dispense with this fallacy. Interpretation remains primarily a purposeful activity; anyone who engages in the interpretative process does so with a desire to achieve a certain outcome.<sup>87</sup> Whether or not judgments are a *source of law* or merely a means for the *determination of the law*,<sup>88</sup> a court's interpretation nevertheless contributes to the creation of what it finds.<sup>89</sup> This occurs through a process of 'normative accretion',<sup>90</sup> through which law is not created as with legislative processes, but rather in a more modest, incremental fashion, clarifying ambiguities and resolving perceived gaps in the law. The open texture of law—and especially of international law—gives judicial institutions heightened influence on the internal understanding of legal rules within the system, offering a set of normative expectations that can be relied upon by States. They are, to borrow a phrase from Christian Tams and Antonios Tzanakopoulos, agents in the international law-making process.<sup>91</sup> Once a general statement on a legal principle or rule has been elucidated by a court, and channelled into the judicial form and buttressed by whatever authority that institution claims, both parties and non-parties cannot in good faith contest that general principle.<sup>92</sup>

There is nothing radical about this; for example, one can turn to Kelsen's interpretative theory, which sought to leave the 'legal politics'<sup>93</sup> of trying to divine the 'right' interpretation,

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<sup>87</sup> Bianchi (n 5) 17.

<sup>88</sup> The classic distinction is well-explained in G Schwarzenberger, *International Law* (3<sup>rd</sup> edn Longmans 1957), vol I, 26-8. See also M Akehurst, 'The Hierarchy of the Sources of International Law' (1974-5) XLVII *British Year Book of International Law* 273, 280.

<sup>89</sup> Venzke (n 13) 71.

<sup>90</sup> T Buergenthal, 'Lawmaking by the ICJ and Other International Courts' in (2009) *Proceedings of the American Society of International Law* 403, 403.

<sup>91</sup> CJ Tams and A Tzanakopoulos, 'Barcelona Traction at 40: The ICJ as an Agent of Legal Development' (2010) 23 *Leiden Journal of International Law* 781, 784; CG Weeramantry, 'The Function of the International Court of Justice in the Development of International Law', (1997) 10 *Leiden Journal of International Law* 309, 311.

<sup>92</sup> GG Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', in *Symbolae Verzijl* (Martinus Nijhoff 1958) 153, 172-3, terms judicial decisions 'quasi-formal' sources of international law. Weeramantry (n 91) 321, goes further: the Court's 'role and duty must extend beyond the immediate case to the elucidation of relevant principles that have arisen for discussion in the context of the case, thereby helping in the development of the law.'

<sup>93</sup> Kelsen, *Pure Theory of Law* (n 3) 353.

and situated interpretation instead as an act of cognition or of will. In this respect, he expressly endorsed the law-constitutive nature of judicial decisions, in so far as these constructed individual norms form the frame of the general norm of the law.<sup>94</sup> This cognitive process may even take into account norms not of the positive law (morals, natural justice, 'constituting social values'). Due to the systemic role of law-applying organs, these are *transformed* into norms of positive law through the act of will or cognition by these organs: '[t]he interpretation by the law-applying organ is always authentic. It creates law'.<sup>95</sup> In this respect, 'authentic interpretation' must be understood as law-creative. It can possess a general character, in that it creates law not only for a concrete case but for all similar cases before it; but it is also authentic if it creates law only for an individual case, because as soon as the validity of the norm is justified through a final judgment by a law-applying organ, it is seen as an authentic interpretation (and thus to be distinguished from the interpretation of a private actor or a legal scholar).<sup>96</sup> In this respect, Kelsen seems to accept the constitutive normative force of judicial decision-making: he even goes so far as to suggest that judicial interpretation is simply a form of legislation, the motives of judges for which being irrelevant for analytical positivists. Interpretation is thus no juristic analysis, but belongs to politics and sociology.<sup>97</sup>

This is an important concession: it conceptualises the frame through which the act of interpretation or application of law by certain organs constitutes the law itself, thus turning the classical legal positivist posture on its head.

Interestingly, the grasp towards coherence embodied by judicial techniques, such as giving reasons, or adhering to previous judicial decisions, is revelatory of the values and norms that are embedded within the legal system.<sup>98</sup> yet the privileging of coherence as a value is the imposition of one view, not merely its 'identification':

The interpretative techniques lawyers used to proceed from a text or a behaviour to its 'meaning' *create* (and do not 'reflect') those meanings ... Hermeneutics, too, is a universalisation project, a set of hegemonic moves that make particular arguments or preferences because they seem, for example 'coherent' with the 'principles' of the legal system ... But they offer no ... authentic translation of the 'raw' preferences of social actors (into) universal law.<sup>99</sup>

In suggesting that hierarchy, order and coherence are intrinsic to juristic thought, one arrives at the implied claim that juristic thought is inherently *good*, valuable. Yet as Beckett argues,

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<sup>94</sup> Ibid 353.

<sup>95</sup> Ibid 353-4.

<sup>96</sup> Ibid 355-6: Kelsen denies this all force: because the filling of gaps in the law can only be performed by law-applying organs, jurisprudential interpretation does nothing more than 'exhibit all possible meanings of a legal norm. Jurisprudence as cognition of law cannot decide between the possibilities exhibited by it, but must leave the decision who, according to the legal order, is authorized to apply the law.' On p. 356: a legal academic propounding an interpretation 'does not render a function of legal science, but of legal politics. He seeks to influence legislation. ... But he cannot do this in the name of legal science ... Jurisprudential interpretation must carefully avoid the fiction that a legal norm admits only of one as the "correct" interpretation'.

<sup>97</sup> LL Fuller, *The Morality of Law* (Yale University Press 1969), 226.

<sup>98</sup> Beckett, 'Fragmentation, Openness, and Hegemony' (n 78) 59.

<sup>99</sup> Ibid, referring to Koskeniemi, *From Apology to Utopia* (n 21), 597-8.

the attempt to introduce a meta-system to ensure coherence makes a necessarily hegemonic claim: it claims its own absolute truth (or a ‘neutrality amongst the other systems’); or ‘it internalises conflicts within and between systems into itself’.<sup>100</sup>

As such, in a sense, any study of the rules of interpretation, which indeed is but a secondary topic in the light of the role of interpretation as a hermeneutic tool, necessarily extends further than the rules themselves, and must also study the *practice* of relevant law-applying actors as an equally important locus for the construction of meaning. For it is the claim of law-applying actors to what Ingo Venzke calls ‘semantic authority’, or the capacity to influence and shape meanings as authoritative reference points in legal discourse’,<sup>101</sup> that is equally important. The focus on interpretative authority opens a discussion on legal normativity, going beyond obligation and very much into the practice of international actors. Any such study might even address the conceptual disagreement as to the *form* of international law itself, a much wider project for all international lawyers.

Yet with power comes responsibility: interpretation cannot just be reduced to the recognition of a norm’s meaning, nor by omnipresent and all-pervasive structures. The interpretative act, when undertaken by certain law-applying actors (and in particular judicial institutions), involves not only a considerable degree of freedom, but amounts to a claim to authority.<sup>102</sup> In this respect, I defer to Julius Stone, who suggested that ‘[t]he important question is whether the tribunal will choose more wisely if it chooses in consciousness of its responsibility rather than in the belief that it has no choice open’.<sup>103</sup> To reject judicial law-creation may accord nicely with a traditional view on the ‘meta-law’ on sources: yet so to do eschews judicial *responsibility* for the interpretation given by a court. Concealed behind the ‘assumed’, ‘implied’, or ‘imputed’ intention of the parties, judicial interpretation is given power or authority, but judicial institutions are not tasked with any *responsibility* for the law so created;<sup>104</sup> and, to cite Stone again, ‘... to conceal creative power by fictions does not prevent its actual exercise’.<sup>105</sup>

Lest we forget that judges are also human beings, not only acting to perpetuate their own power (although in fact, often very concerned with their prestige), but also *normative* actors conditioned by their legal upbringing and the career that brought them to the

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<sup>100</sup> Beckett, ‘Fragmentation, Openness, and Hegemony’ (n 78) 67.

<sup>101</sup> Venzke, ‘How Interpretation Makes International Law’ (n 13) 63.

<sup>102</sup> Ibid 13.

<sup>103</sup> Stone, ‘Fictional Elements’ (n 46) 367. He continues: ‘[t]here is room, therefore, for the view that the fictions which combine to conceal judicial creativeness in international law serve the proper social function of protecting the growing judicial arm against premature strains.’

<sup>104</sup> Ibid 349. At 363-364, he again touches upon this theme of the result of a refusal to consider the law-creating judicial role in interpretation.

<sup>105</sup> Ibid 364. As he suggests, canons of interpretation have served judicial institutions threefold: first, by creating ‘captions’ under which precedents and principles could be marshalled; secondly, they gave tribunals a sense of ‘continuity of tradition’, situating them in a larger work; thirdly, they gave tribunals support that their reasoning and decisions had ‘an objective validity’ even before such decisions were reached. At p. 365, he suggests that canons of interpretation can ‘serve as rules of *prudence* reminding the tribunal of the complexity of its task, and the need to embrace the full range of relevant considerations before making a final choice’.

international bench in the first place,<sup>106</sup> one must be chary of placing undue weight on judicial interpretation as authoritative:

Self-interested interpretation presented as authoritative or objective interpretation has been an essential ingredient of all patterns of domination, veiling oppressive and exploitative relationships in the guise of that which is ‘natural’ or ‘true’ or ‘necessary’.<sup>107</sup>

Is there another way? Jason Beckett makes an interesting suggestion in the context of his thoughts on fragmentation, and I wonder whether they have relevance here: ‘we must learn to embrace this loss of control, or better still, to re-imagine it as an assumption of responsibility. Coherence, hierarchy, accommodation and other mechanisms of conflict displacement are, perhaps better understood as conflict denial, and thus of a refusal of responsibility’.<sup>108</sup> In this regard, the impulse towards coherence is an attempt to refuse responsibility: by *exercising* semantic authority without claiming the authority to do so, judicial institutions can evade *responsibility* for the substance of the international legal order, and equally so, the international legal order—the embodiment of rationality and logic—can evade the responsibility for the substantive problems caused within the law itself. It is perhaps a step too far to isolate the judicial function fully from any responsibility for political choice; yet it is all too often it is the case, insulated in the reassuring positivism of ‘objectivity’, that judicial institutions exercise that political role described by Dworkin.

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<sup>106</sup> See Falk, ‘On Treaty Interpretation’ (n 46) 354, characterises these ‘biasing impacts’ as curiously overlooked by the New Haven school.

<sup>107</sup> Ibid 324-5.

<sup>108</sup> Beckett, ‘Fragmentation, Openness, and Hegemony’ (n 69) 68.